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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1178 87

UNITED STATES, Petitioner

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO

MOTION OF THE NEW JERSEY ZINC COMPANY TO BE DEEMED AS A RESPONDENT AND BRIEF IN OPPOSITION TO PETITION OF THE UNITED STATES FOR WRIT OF CERTIORARI.

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THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO

MOTION OF THE NEW JERSEY ZINC COMPANY TO BE NAMED AS A RESPONDENT AND FOR CORRECTION OF THE CAPTION

The New Jersey Zinc Company, a Delaware corporation, moves the Court to be named as a respondent in this case and for appropriate correction of the caption for the following reasons:

1. Notice of docketing of the petition for writ of certiorari on February 12, 1970, was received by counsel for The New Jersey Zinc Company on February 16, 1970, by mail addressed to counsel, but the petition for certiorari omitted The New Jersey Zinc Company as a respondent in the case.

2. Movant, as one of the parties in the pending proceeding in the District Court in and for the County of Eagle, Colorado, and as an intervenor in the case below before the Colorado Supreme Court is a party in a position adverse to that of the Petitioner and desires to oppose the petition for certiorari and to participate otherwise in this proceeding in all respects as a party respondent.

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UNITED STATES, Petitioner

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THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO

BRIEF IN OPPOSITION TO PETITION OF THE UNITED STATES FOR WRIT OF CERTIORARI.

Statement of Position of The New Jersey Zinc Company

The New Jersey Zinc Company, an Intervenor below, operates a mine and mill at Gilman, in Eagle County, Colorado. It depends upon the availability of an adequate, reliable water supply for use in its operations. To this end, it has acquired, under the statutes of the State of Colorado, numerous water rights in the Eagle River and its tributaries in Water District No. 37 of the State of Colorado, and has pending in the current adjudication proceeding in Water District No. 37 additional claims to the use of water. But all of the rights of The New Jersey Zinc Company would be jeopardized should a priority date be established for rights claimed by the United States for the White River National Forest as of the date the forest

lands were withdrawn from the public domain, August 25, 1905.

ARGUMENT

I. *The Finality Question*

The Petitioner agrees that the judgment of the Colorado Supreme Court[1] discharging the rule granting prohibition against the District Court of Eagle County from further proceeding in this matter is such a final judgment under 28 U.S.C. § 1256 (3) (1964) as to invoke the jurisdiction of this Court.[2] But even if the ruling of the Colorado Supreme Court is final, certiorari should not be granted. Since a ruling by this Court would be advisory only, the petition should be denied.

II. *The Court's Ruling Would Be Advisory Only*

As was said in *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379 (1953):

> Were our reviewing power not limited to "final" judgments, litigants would be free to come here and seek a decision on federal questions which, after later proceedings, might subsequently prove to be unnecessary and irrelevant to a complete disposition of the litigation.

Such is the case here.

The United States has been made a party to the Eagle County proceedings under the provisions of 43 U.S.C. § 666 (1964). Other than its motion attacking the trial court's jurisdiction, no pleadings have been filed by the

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[1] ——— Colo. ———, 458 P.2d 760 (1969).

[2] Respondent believes that Michigan C. R. Co. v. Mix 278 U.S. 492 (1929), and Mt. Vernon-Woodbury Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916), are more directly in point than the cases cited by the United States.

Government. No claim for rights to the use of water in Colorado, either for rights acquired under state law by the United States, or so-called "reserved" rights, has been filed by the United States.[3] Until the United States has asserted a claim which has been denied either as to quantity or as to priority date, it has no ground for appeal to this Court.

The bulk of the petition filed by the United States speculates as to possible future arbitrary or illegal acts by the state courts of Colorado. Such a course of conduct on the part of a branch of a sovereign state should not be presumed.[4] In the unlikely event that the United States, upon the conclusion of the Colorado proceedings, feels that it has not received all of the relief to which it is entitled, the normal avenues of review, including those providing for review by this Court, will remain open to it. This Court will not assume a fair trial cannot be afforded the United States in a state court.[5]

The United States seems in its Petition, at page 3, to concede that if the Colorado proceeding adjudicates rights to a river system, the Government must appear and assert appropriative rights acquired pursuant to state law, but that in no event should it be required to assert its reserved rights. This has not previously been the position of the United States.

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[3]Colo. Rev. Stat. Ann. § 148-9-8(1) (1963) provides:

> No owner nor claimant of any water right may introduce evidence concerning the same in any adjudication suit until there shall have been first filed in said suit a statement of claim duly signed and verified by or on behalf of one or more owners or claimants of such water right. . . .

[4]**See e.g.,** Owens v. Green, 400 Ill. 380, 81 N.E.2d 149 (1948); Ferderer v. Northern Pac. R. Co. 75 N.D. 139, 26 N.W.2d 236 (1947); Johnston v. Johnston, 122 Fla. 372, 165 So. 698 (1936).

[5]**E.g.,** Darr v. Burford, 339 U.S. 200, 205 (1950), **overruled on other grounds,** Fay v. Noia, 372 U.S. 391 (1963); United States v. Dewar, 18 F. Supp. 981 (D. Nev. 1937).

The position of the United States in *Green River Adjudication v. United States,* 17 Utah 2d 50, 404 P. 2d 251 (1965), cited on page 12 of the Petition, was that "the orderly way to administer such usage (reserved rights) would be through the appropriative laws of the State of Utah." No reason is suggested why a procedure orderly in Utah becomes disorderly in Colorado.

Fear is also expressed that the true date of appropriation may not be available to the United States because the present proceeding is a supplemental, rather than an original adjudication. Again, the concern is premature. The Colorado Supreme Court expressed confidence that the lower court, through appropriate notice procedures, could obtain jurisdiction of all necessary parties. Until this confidence is proved to be unfounded, this Court should not interfere.

Prior to 1969, Colorado was the only one of the states following the appropriation doctrine which authorized adjudications of portions of stream systems. By legislation adopted in 1969,[6] water districts have been abolished, and each stream system is now a separate unit. If the argument of the United States is sound, the United States could be joined under 43 U.S.C. § 666 in 1970, but could not have been so joined in 1968. The fallacy of this argument seems clear. As pointed out in the Colorado Supreme Court opinion,[7] the McCarran Amendment refers to "adjudication of rights to the use of water of a river system," rather than to an "entire river system." But Colorado law recognizes the interrelation of rights in separate water

[6]Colo. Sess. L. (1969) ch. 373.

[7]See the quotation from Ft. Lyon Canal v. Arkansas Valley S.B. & I.L. Co., 39 Colo. 332, 90 P. 1023 (1907), quoted in the Colorado Supreme Court opinion, and found on page 31 of the Appendix to the Petition of the United States.

districts, and makes provision for the protection of all rights.[8]

CONCLUSION

The anticipatory cries of anguish arise before any trauma has occurred. We have here a proceeding under state law where the initiator of that proceeding has followed the procedures required to remove the immunity from suit normally exercised by the United States. As was stated in *Pan American Corp. v. Superior Court*, 366 U.S. 656 (1961), cited by the United States in its Petition at page 8:

> But questions of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal law. The answers depend on the particular claims a suitor makes in a state court—on how he casts his action. Since "the party who brings a suit is master to decide what law he will rely upon." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, the complaints in the Delaware Superior Court determine the nature of the suits before it.
>
> . . . If the plaintiff decides not to invoke a federal right, his claim belongs in a state court.
>
> . . . What was said in *Gully v. First National Bank*, 299 U.S. at 116, is apposite:
>
> > "We recur to the test announced in *Puerto Rico v. Russell & Co.*, supra, 'The federal nature of the right to be established is decisive—not the source of the authority to establish it.' Here the right to be established is one created by the state. If that

[8]Petition of United States, Appendix A, 31-32.

> is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. *Louisville & Nashville R. Co. v. Mottley, supra.* With no greater reason can it be said to arise thereunder because permitted thereby."

Although we believe that the propriety of the current state court proceeding and the jurisdiction of that court over the United States would be upheld if certiorari were granted, and the legal issues fully developed, we are equally certain that such a determination at this time would be premature and might very well fail to meet the ultimate issues presented after the United States has filed whatever statements of claim it may elect to file and there has been a decision on the merits. The expense and delay which the granting of certiorari would entail may well, in the final analysis, be wholly unnecessary and therefore should be avoided.

Respectfully submitted,

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